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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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Imants Deme

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EXAMINER

PARVINI, PEGAH

ART UNIT

PAPER NUMBER

1793

MAIL DATE

DELIVERY MODE

10/27/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/582,060	Applicant(s) DEME, IMANTS	
	Examiner PEGAH PARVINI	Art Unit 1793	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 17 June 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 10-14, 16-18, 20-24, 30, 32-36 and 38-45 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 10-14, 16-18, 20-24, 30, 32-36 and 38-45 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The rejection of **claims 10-14, 16-18 and 36** under 35 U.S.C. 103(a) as being unpatentable over AU 9715194 in view of Etnyre and in further view of Gaw as generally presented in the previous Office action is proper and stands.

The rejection of **claims 20-24, 30, 32 and 35** under 35 U.S.C. 103(a) as being unpatentable over Gaw in view of Etnyre as generally presented in the previous Office action is proper and stands.

The rejection of **claim 33** under 35 U.S.C. 103(a) as being unpatentable over Gaw in view of Etnyre as applied to claim 32 and further in view of Hayner as generally presented in the previous Office action is proper and stands.

The rejection of **claim 34** under 35 U.S.C. 103(a) as being unpatentable over Gaw in view of Etnyre and Hayner as applied to claim 33 and further in view of Burris et al. as generally presented in the previous Office action is proper and stands

Response to Arguments

Applicants' arguments filed June 17, 2009 have been fully considered but they are not persuasive.

In response to Applicants' argument, specially with reference to Hayner and Burris et al., that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Furthermore, it should be noted that both claims 33 and 34, indirectly, depend on claim 30 which recite the language of "comprises"; therefore, the addition of other materials and/or components to the sulfur (in addition to hydrogen sulfide suppressant and bitumen or aggregate or both) does not contradict with what is claimed instantly.

Applicants have argued that there is no suggestion in the prior art teachings that a sulfur pellet with a hydrogen sulfide suppressant may be formed at a separate location than which an asphalt composition is formed and where the sulfur pellet is added.

The Examiner, respectfully, submits that making sulfur pellets at a separate location that which an asphalt composition is formed is a feature not recited in instant claims.

Applicants have argued that no combination of references teaches a composition that is predominantly or close to entirely all sulfur and which further has a concentration of hydrogen sulfide suppressant.

The Examiner, respectfully, submits that based on claims 21 and 24, there exists hydrogen sulfide suppressant and filler in the pellet as well; thus, the composition claimed is not “predominantly or close to entirely all sulfur” and need not to be based on the recitation of instant claims. Furthermore, the combination of Gaw in view of Etnyre, as detailed in the previous Office action and summarized above, make it obvious to use sulfur and suppressant in at least overlapping ranges amounts. Further said combination of references, as clearly stated in the previous Office action page 7, it would have been obvious to a person of ordinary skill in the art to form pellets of sulfur and suppressant in order to assist in handling.

Applicants have argued that an example benefit of Applicants’ invention may be that the hydrogen sulfide suppressant may be more homogeneously incorporated in the resulting sulfur comprising asphalt paving mixture because the hydrogen sulfide suppressant is added as part of one of the components.

It is, respectfully, submitted that a homogenous incorporation of hydrogen sulfide into the composition is a feature not recited in the language of the claims. Furthermore, this feature is considered to be a characteristic/property following from the composition of the combination of references unless Applicants can show by way of tangible

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evidence that the prior art does not meet this feature or characteristic. In other words, said argument can not take the place of evidence.

With reference to Applicants' arguments drawn to the Declaration under Rule 37 CFR 1.132 filed on July 11, 2008, it is to be noted as addressed in the Final Rejection mailed on 10/15/2008, said declaration presented no data to show unexpected results for addition of pellets comprising an H₂S suppressant and sulfur as recited in instant claims. For example, H₂S suppressant was used in an amount of 0.5% whereas claims recite a content of 0.02% to 10%. Furthermore, the declaration did not present persuasive showing of unexpected results for a process of manufacturing sulfur-comprising asphalt paving mixture as recited in instant claims.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

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the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to PEGAH PARVINI whose telephone number is (571)272-2639. The examiner can normally be reached on Monday to Friday 8:00am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jerry Lorengo can be reached on 571-272-1233. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Pegah Parvini/
Examiner, Art Unit 1793

/Anthony J Green/
Primary Examiner, Art Unit 1793